



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 1440/14

In the matter between:

MITRE VENEERING CC

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER DIDA MASENYE
(N.O.)**

Second Respondent

ITU obo ALBERT DLAMINI

Third Respondent

Heard: 22 February 2018

Delivered: 06 March 2018

Summary: (Review – reasonableness – misconstruing evidence – failing to consider the weight of untested evidence – failure to consider overall probabilities in dealing with mutually destructive versions)

JUDGMENT

LAGRANGE J

Background

- [1] This is a review application of an arbitration award. The arbitrator reinstated two employees after finding that they had not been guilty of attempted theft of boarding material belonging to a client.
- [2] The incident giving rise to the dismissal occurred when the two employees had delivered approximately 60 boards to the client ('Da Vinci'), and Da Vinci's factory manager was alerted to the presence of 4 other boards on the vehicle after the delivery had been unloaded. He identified those boards as belonging Da Vinci. His un-contradicted testimony was that the applicant company ('Mitre') did not make that type of board. By implication, the four boards could not have been boards loaded on the van for a subsequent delivery to another client. In addition to the four boards, there were cover boards on the vehicle which are boards used to protect the stock and two other boards destined for delivery to Ukhuni, another client of Mitre's. He returned to his office to call the sales representative of the Mitre who was at the client's office at the time. He wanted to show him the board's which had been loaded onto the truck, but when they returned to the vehicle, the board's had been removed and the two employees denied having offloaded anything from the truck apart from the 60 boards which they delivered.
- [3] The arbitrator found that the employees were not guilty of the attempted theft and ordered their reinstatement. The arbitrator effectively concluded that the only reason Mitre had dismissed the employees was because it feared losing the contract of Da Vinci if it was not seen to act decisively in dealing with the alleged misconduct. As such, the arbitrator accepted that an improper motive was the real reason for the dismissal. In considering the evidence of Da Vinci's factory manager, she decided that his evidence of the four boards being on the vehicle had to be disbelieved as hearsay because he had not seen the board's being loaded onto the vehicle or offloaded.

Grounds of review

- [4] Mitre takes the award on grounds of unreasonableness and on the basis that the arbitrator misconstrued some of the evidence. The key issue to be considered in a review of this kind is whether the findings of the arbitrator which the applicant challenges are ones that could not logically be sustained if the arbitrator had not made the supposed errors identified.

First ground:

- [5] The applicant contends that the Commissioner could not reasonably have concluded that it dismissed its two employees because the client had asked it to do so under threat of losing the contract with the client. In this regard, the applicant argues that there was no reason for da Vinci to fabricate the complaint against the employees as there was nothing da Vinci stood to gain by doing so. The arbitrator ought to have realised that the applicant's relationship with the client was jeopardised by conduct of the two employees and not because the client was looking for some pretext to end the contract and had trumped up the complaint in order to provide the reason. It further points out that the arbitrator ignored evidence that the client also dismissed two of its own employees relating to the incident.

Second Ground:

- [6] The arbitrator misconstrued the evidence of the factory manager in saying that it was hearsay evidence because he did not see the loading or offloading of the boards in question. In so doing, the arbitrator ignored the fact that the factory manager had testified to seeing boards of his company on the vehicle and that when he returned from the office with Mitre's sales manager the four boards had already been removed. The arbitrator also unreasonably discounted his evidence that the two employees could not provide him with an invoice in support of their claim that the four boards were on the truck for another client.

Third ground:

- [7] The applicant argues, in the alternative that, even if the dismissal was unfair, the Commissioner misconstrued the evidence in finding that there was no evidence indicating that the employment relationship had broken down in deciding that reinstatement was appropriate. It contends that based on the outcome of the disciplinary enquiry and the seriousness of the misconduct, the arbitrators decision to reinstate the applicants could not be justified. This ground is not really a competent ground of review because the arbitrator decided that the employees were not guilty of attempted theft. If she had found them guilty then a finding of untrustworthiness would have been implicit in the outcome, but in the absence of that finding there was no other evidence on which untrustworthiness could have been established.

Evaluation:*First Ground*

- [8] In deciding that the charges against the two employees were brought about because da Vinci had instructed Mitre to dismiss them, or had implied that it must do so, under threat of the contract being terminated, the arbitrator referred at paragraph 5.3 of her award to the comment by the chairperson of the disciplinary enquiry to the effect that neither company stood to gain anything by fabricating the charges, but that the applicant stood to lose its biggest client if no action was taken against the two employees. The arbitrator also found that the fact that the client had also dismissed two of its own employees in connection with the incident placed undue pressure on the applicant to dismiss its employees as well.
- [9] I accept that the arbitrator was entitled to draw an inference that there might have been pressure on the applicant to take disciplinary steps, when the client had complained to it, but the arbitrator's job was to determine for herself whether or not the evidence supported the charges against the employees. What the arbitrator appears to have done was to have concluded that the applicant had a motive to act which determined the outcome of the hearing. Even if the arbitrator believed that to be true, her

job was to independently assess if the evidence relating to the charges supported the case against the employees

- [10] Moreover, it is not apparent that the comment by the chairperson of the disciplinary enquiry was ever referred to in the arbitration proceedings, and da Vinci's factory manager's evidence was simply that his employer had requested Mitre to take the matter further but had not recommended dismissal as such. Da Vinci had also independently laid charges of attempted theft against the applicants and its own employees who were implicated in the incident, so it took its own steps against them irrespective of what Mitre did. . In passing it should also be mentioned that no evidence was advanced why Da Vinci would have had any reason to cancel the contract and why it would have needed a pretext to do so.
- [11] In short, the arbitrator's reliance on a conspiracy initiated by Da Vinci cannot logically be supported by the evidence before her and the review succeeds on this ground alone.

Second ground

- [12] The arbitrator's analysis of the factory manager's evidence is set out in paragraph 5.6 of the award, supplemented by what is set out in paragraph 5.8.:

"5.6 Mr Bosman's evidence was based on hearsay. I am saying this because he did not see the loading or offloading of the boards in question. If he had indeed found the unauthorised boards on the track the applicant was driving, or he had to do was to give an instruction to one of his subordinates to call Ashwin [Mitre's sales manager] from his office so that he could come and witness or see the evidence. Instead he walked away from the truck to call Ashwin and when they came back the boards in question could not be found on the track. I find this version of Mr Bosman not probable. It was no evidence led which would have indicated that Mr Sunday or any other employee of da Vinci decor saw the applicant and his assistant offloading back the boards in question to where they were originally.

5.8 The testimony of the applicant that there were cover boards on the truck was not challenged. Ashwin worked for the respondent and on

verification of the invoice of Ukhuni, he could have disputed that there was no such delivery. But there was no such dispute or challenge. In fact he did not witness anything.”

- [13] The arbitrator correctly observed that Bosman did not actually observe the loading of the boards on to the truck or their offloading. He criticises the factory manager for not remaining on the scene and sending someone else to call the applicant's sales manager to witness the boards on the truck. What the arbitrator does not deal with is the direct evidence of Bosman that he saw and identified the boards on the truck as boards belonging to Da Vinci, which could not have formed part of a delivery of boards by Mitre because Mitre did not make that specific type of board. Under cross-examination, Bosman confirmed that four boards he had seen on the vehicle were double faced Sapele Veneer, which Mitre did not make. He was never challenged on this assertion. Bosman had also testified that he had asked the employees if they had any other deliveries to and they had said they did not and could not provide him with any invoices except for the boards which they had delivered to his firm and two other boards which remained on the vehicle, which were destined for Ukhuni. It was put to him under cross-examination that there was an invoice for the 4 boards in question. It was common cause on the evidence that there were two other boards to be delivered to another client Ukhuni. The arbitrator appears to have confused these two boards with the four boards identified by the Bosman, as indicated by her reasoning in paragraph 5.8 of the award from which it appears that she believed that Bosman and Ashwin were doubtful about whether there was a further delivery to be made to Ukhuni.
- [14] In brief, Bosman's version was that he had been summonsed by another employee to inspect what was on the truck. He saw the four boards which he identified as belonging to Da Vinci. When he questioned the two employees they had no paperwork for the four boards and that is when he decided to fetch the Mitre sales manager to witness what was loaded on the van. When they returned the four boards had been offloaded. It is important to note that he was called to witness what was on the vehicle after the 60 boards had been delivered and was not involved in the receipt

of the 60 boards, which had been received by a Da Vinci employee referred to only as 'Sunday'. On his version the only reason he went to the vehicle was because he had been told by Sunday of the four boards that had been loaded onto it. However, on the employees' version, which was never put to Bosman under cross-examination, he had personally received and checked the delivery of the 60 boards and no other Da Vinci employee was involved. Mr Dlamini who testified first, claimed that Bosman had queried the other boards on the vehicle and he had told him that they were to be delivered to Ukhuni. Bosman asked him for the invoice which he gave to him and said he was going to the office to confirm that. Again, this too was never put to Bosman under cross-examination. When Bosman returned with Ashwin, Ashwin asked him where the four boards were. Mhlongo did not mention Bosman going to the office at all.

- [15] The versions are mutually exclusive in that the employees insisted that the four boards identified by Bosman were never on the van and that Bosman was the person who received and checked the delivery. The only thing the versions have in common, at least if Dlamini's version is accepted as more comprehensive than Mhlongo's is that, at some point Bosman went to the office and returned with Ashwin. Yet, even on his version Ashwin had asked him about the four boards not about the order for Ukhuni. Before getting into the credibility of the respective witnesses, the arbitrator had to consider the inherent probabilities of the two versions taking into account that crucial parts the employee's version had not been put to Bosman.
- [16] The upshot of their version was that, Bosman after witnessing them offloading the delivery for Da Vinci, arbitrarily queried the boards remaining on the vehicle and when given the invoice for Ukhuni went to verify it at the office. If the only boards on the vehicle were the five cover boards and the two boards to be delivered to Ukhuni and if the invoice for Ukhuni corresponded with the two boards, there would have been no reason for Bosman to have laid a complaint against them, except some undisclosed malicious motive. Their version also should have been evaluated taking account of the fact that they never confronted Bosman

under cross-examination with their claim that he was present and witnessed the offloading of the order for Da Vinci and that he had said he was going to the office to check the invoice for Ukhuni. Their version in those respects ought to have been ignored because they never tested it with him.

- [17] Moreover, the arbitrator failed to consider the inherent plausibility of Bosman's version that he had been summoned to see for himself what was on the vehicle by another employee who was working in the receiving section and that ordinarily there would be no reason why Bosman himself would personally be receiving deliveries at the factory. In other words, barring a most elaborate ruse, it inherently more likely that Bosman was called to inspect what the van was carrying because there was cause for concern. There was also no reason for him to doubt the invoice for Ukhuni if it corresponded with what was on the vehicle. Bosman never disputed that there was an invoice for two boards to be delivered to Ukhuni. It was the employees' inability to explain the four boards which did not form part of stock supplied by Mitre which caused him to return to the office to fetch Mitre's sales manager.
- [18] No motive was suggested by the employees as to why Da Vinci would dream up this elaborate scenario and dismiss two of its own employees as part of the conspiracy. It is true that if Mitre had not taken any action that might have soured the relationship between Da Vinci and Mitre, but it does not follow that the complaint was trumped up in the absence of any evidence of a motive on the part of Da Vinci for doing so.
- [19] The arbitrator's own evaluation of the evidence is patchy and shows that she failed to deal with the direct evidence of Bosman as to what he saw and weigh that up against all the other evidence. She also appears to have misconstrued what was common cause, namely that there were cover boards on the vehicle and there were two other boards on the van destined for Ukhuni. Had she evaluated all this evidence, without misconstruing Bosman's evidence and what was common cause and discounting parts of the employee's version which had not been tested with Bosman, she would have been compelled to conclude on a balance

of probabilities that the employees were guilty of attempted theft of the four boards.

- [20] Given the nature of the misconduct, it stands to reason that an employee found guilty of attempted theft has broken the trust relationship with the employer and in the absence of any evidence to the contrary, it is unlikely to be restored.

Order

- [1] The arbitration award dated 24 June 2014 issued by the second respondent under case number GAJB17708-13 is reviewed and set aside.
- [2] Paragraph 6 of the award is substituted with a finding that the dismissal of the applicant, Mr A Dlamini, was substantively fair.
- [3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

B L Roode instructed by
Deon de Bruyn Attorneys

RESPONDENT:

S Luthuli of Inqubelaphambili
Trade Union or